Serial: **199090**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-CT-00159-SCT

WILLIE LEE MADDEN JR. a/k/a
WILLIE L. MADDEN JR.

v.

STATE OF MISSISSIPPI

EN BANC ORDER

This matter comes before the en banc Court on the Court's own motion. The Petition for Writ of Certiorari filed by Willie Madden was granted by order of this Court on December 10, 2014. Upon further consideration, the Court finds that there is no need for further review and that the Writ of Certiorari should be dismissed.

IT IS THEREFORE ORDERED, pursuant to Mississippi Rule of Appellate Procedure 17(f), that the Writ of Certiorari is dismissed.

SO ORDERED, this the 5 day of June, 2015.

/s/ Josiah Dennis Coleman
JOSIAH DENNIS COLEMAN, JUSTICE

TO AGREE: WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR, CHANDLER, PIERCE AND COLEMAN, JJ.

KITCHENS, J., OBJECTS WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, J.

DICKINSON, P.J., OBJECTS TO SEPARATE WRITTEN STATEMENT BY KITCHENS, J., JOINED BY WALLER, C.J.

KING, J., OBJECTS WITH SEPARATE WRITTEN STATEMENT.

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KITCHENS, JUSTICE, OBJECTS WITH SEPARATE WRITTEN STATEMENT:

¶1. With respect, I object to today's order dismissing this case after grant of certiorari, because Madden received and is serving an illegal sentence, as explained below.

¶2. The imposition of an illegal sentence constitutes an exception to the procedural bars of the Uniform Post-Conviction Collateral Relief Act (UPCCRA). ***Rowland v. State***, 98 So. 3d 1032, 1036 (Miss. 2012) (citing ***Ivy***, 731 So. 2d at 603; ***Kennedy***, 732 So. 2d at 186-87; ***Luckett v. State***, 582 So. 2d 428, 430 (Miss. 1991) *overruled by* ***Rowland v. State***, 42 So. 3d 503 (Miss. 2010); ***Grubb v. State***, 584 So. 2d 786, 789 (Miss. 1991)). "Like a double-jeopardy claim, a claim of illegal sentence or denial of due process in sentencing also must be considered regardless of when it is raised, because the State is without authority or right to impose a sentence illegally or without due process of law." ***Rowland***, 98 So. 3d at 1036.

¶3. Madden was sentenced as an habitual offender to fifteen years in the custody of the Mississippi Department of Corrections pursuant to Mississippi Code Section 99-19-81. The trial court ordered that the sentence be served day-for-day: "[t]he sentence shall not be reduced or suspended nor shall such person be eligible for parole as provided in Section

99-19-81 . . . .” But Madden had pled guilty to transfer of a Schedule II controlled substance in violation of Mississippi Code Section 41-29-139(a)(1) (Rev. 2013). Transfer of a Schedule II controlled substance carries a thirty-year maximum sentence. *See* Miss. Code Ann. § 41-29-139(b)(1) (Rev. 2013) (“In the case of controlled substances classified in Schedule I or II . . . such person may, upon conviction, be imprisoned for not more than thirty (30) years . . . .”)

¶4. Mississippi Code Section 99-19-81 provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, *shall be sentenced to the maximum term of imprisonment prescribed for such felony,* and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-81 (Rev. 2007) (emphasis added). Under Section 99-19-81, the trial court was bound to sentence Madden to a term of thirty years, day-for-day. Instead, Madden’s sentence was fifteen years, day-for-day.

¶5. This Court has held that, “by virtue of . . . Section 99-19-81 (Supp. 1987), the trial court, as a matter of state statutory law, has no sentencing discretion.” ***Clowers v. State***, 522 So. 2d 762, 764 (Miss. 1988). However, “[t]his does not end the discussion . . . .” ***Id.*** In ***Clowers***, the trial court had sentenced Clowers as an habitual offender under Mississippi Code Section 99-19-81 “to five years without possibility of suspension, probation or parole.” ***Id.*** at 763. The maximum sentence for Clowers’s crime, uttering a forged $250 check, was fifteen years. ***Id***. The trial court had found that a fifteen-year sentence was so

disproportionate as to amount to cruel and unusual punishment. ***Id.*** The trial court had opined:

> In my opinion, it is disproportionate to the maximum sentence for a more serious crime in the State of Mississippi. It's more serious--carries a higher maximum sentence than burglary, that is business burglary and house burglary and carries the same maximum sentence for house burglary of an occupied dwelling and carries a higher maximum sentence than attempted murder and has a much higher sentence than grand larceny.

Id. at 764.

¶6. This Court held that the trial court had not committed reversible error in reducing what it had found to be a disproportionate sentence. ***Id.*** at 765. Nevertheless, the Court admonished Bench and Bar that "[o]ur approval of the sentence in this case should not be taken to intimate that reduced sentences for habitual offenders might become the rule" and noted that "***Solem v. Helm*** does not represent a de facto grant of sentencing discretion, but, rather ties proportionality to the three step analysis outlined therein." ***Id.*** In ***Solem v. Helm***, the United States Supreme Court held that "no penalty is per se constitutional," that sentences remain subject to a proportionality analysis under the Eighth Amendment. ***Solem v. Helm***, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). There, the Court established objective criteria for conducting an Eighth Amendment proportionality analysis, whereby the following must be considered by the sentencing court: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." ***Id.*** at 292. The trial court in Madden's case should have performed such an

analysis in order to justify a downward departure from the prescribed maximum sentence of thirty years.

¶7. The record does not reflect that the trial court conducted a proportionality analysis and made a finding of disproportionality regarding Madden's mandated thirty-year sentence, though ***Clowers*** was cited in its order. In the absence of the trial court's finding, on the record, after a proportionality hearing—also on the record, of course—that a prison term of thirty years would be disproportionate to the crime Madden had been adjudicated of committing, the sentencing judge was without authority to sentence Madden, as an habitual criminal under Section 99-19-81, to anything other than thirty years' imprisonment. As such, it was not lawful for the trial court to impose a day-for-day condition on Madden's fifteen-year sentence. I would reverse the trial court's and Court of Appeals' judgments and remand the case to the Circuit Court of the First Judicial District of Harrison County for that court to conduct an Eighth Amendment proportionality hearing under ***Solem v. Helm*** to ascertain whether Madden should be sentenced as a Section 99-19-81 habitual criminal to a term of thirty years, or to a term of imprisonment less than thirty years, in accordance with our decision in ***Clowers v. State***.

KING, J., JOINS THIS SEPARATE WRITTEN STATEMENT.

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DICKINSON, PRESIDING JUSTICE, OBJECTS TO SEPARATE WRITTEN STATEMENT BY KITCHENS, J.

¶1. While I do not disagree with Justice Kitchens's thoughtful analysis of the legality of Madden's sentence, I cannot join it. The trial judge sentenced Madden to a term of imprisonment that is less than the statutes require. While Madden has a constitutional right not to be subjected to an illegally excessive sentence – allowing us to review the issue on his behalf *sua sponte* – the State has no constitutional protection from an illegally lenient sentence, and because the State did not raise the issue, I decline to address it.

WALLER, C.J., JOINS THIS SEPARATE WRITTEN STATEMENT.

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KING, JUSTICE, OBJECTS WITH SEPARATE WRITTEN STATEMENT:

¶1. Because I believe that Madden is entitled to an evidentiary hearing to determine whether his fundamental right to due process was violated, I respectfully object to the order entered herein.

¶2. Willie Madden was convicted for the transfer of a controlled substance and sentenced as a habitual offender to serve fifteen years, day-for-day. Madden contends he was illegally sentenced as a habitual offender, and that his trial counsel was ineffective.

¶3. In March 2002, Madden was indicted for the transfer of a controlled substance in the First Judicial District of Harrison County. The indictment charged Madden as a repeat offender in violation of Mississippi Code Section 41-29-147, and as a habitual offender under Section 99-19-81.

¶4. On April 8, 2004, the State entered an order agreeing to waive "the enhanced portion" of the indictment. Madden then pleaded guilty to a charge of transfer of a controlled substance. Madden's Petition to Enter Plea of Guilty stated that Madden's possible sentence was a minimum of zero years and a maximum of thirty years. Handwritten in the blank spaces after this statement, the petition reads, "open plea; State to drop enhancement portion

of indictment." Another handwritten note in the left margin reads, "Defendant indicted as habitual offender, sentence to be day for day." Madden admitted his two prior felony convictions that were named in the indictment.

¶5. A judgment of conviction was entered on July 14, 2004, and Madden was sentenced as a habitual offender to serve fifteen years, day-for-day. Madden filed his first post-conviction relief (PCR) motion on December 13, 2005, which the circuit court denied. The Court of Appeals affirmed the circuit court's judgment on February 19, 2008. ***Madden v. State***, 991 So. 2d 1231 (Miss. Ct. App. 2008).

¶6. On February 13, 2009, Madden filed a second PCR motion. The circuit court dismissed the motion and the Court of Appeals affirmed on June 29, 2010. ***Madden v. State***, 52 So. 3d 411 (Miss. Ct. App. 2010).

¶7. On June 2, 2010, Madden filed a third motion for PCR. The circuit court dismissed the motion as a successive writ and as barred by the statute of limitation, and the Court of Appeals affirmed on November 29, 2011. ***Madden v. State***, 75 So. 3d 1130 (Miss. Ct. App. 2011).

¶8. Madden then filed his current motion pursuant to Mississippi Rule of Civil Procedure 60(b)(6), claiming the State's agreement to drop the enhanced-penalty portion of the indictment included Madden's habitual-offender status. The circuit court treated this as a fourth PCR motion and found that Madden's habitual-offender status was not part of the plea-bargain agreement. The Court of Appeals concurred and held that "[M]adden's motion, though couched in terms of the Mississippi Rules of Civil Procedure, is a PCR motion

pursuant to Mississippi Code Annotated section 99-39-5(1) (Supp. 2013). Hence his fourth PCR motion is both without merit and procedurally barred as untimely and as a successive writ." ***Madden v. State***, 2014 WL 1887542, at *1, 2013-CP-00159-COA (Miss. Ct. App. May 13, 2014).

¶9. Madden filed a petition for writ of certiorari, and this Court granted the petition. Madden first argues that he was improperly sentenced as a habitual offender and, second, that his trial counsel was ineffective.

¶10. A denial of a motion for post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. ***Rowland v. State***, 42 So. 3d 503, 506 (Miss. 2010) (citations omitted). However, when questions of law are raised, the proper standard of review is de novo. ***Id.***

¶11. Under the Uniform Post-Conviction Collateral Relief Act (UPCCRA), a person who enters a guilty plea should file a PCR motion within three years after entry of the judgment of conviction. Miss. Code Ann. § 99-39-5(2) (Rev. 2007). The UPCCRA also procedurally bars successive writs. Miss. Code Ann. § 99-39-23(6) (Supp. 2014). Although Madden's motion was time-barred and barred as a successive writ, this Court has clearly established that claims affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA. ***Rowland***, 42 So. 3d 503, 507-08. "[C]laims of constitutional dimensions are likewise excepted from common-law *res judicata*." ***Smith v. State***, 149 So. 3d 1027, 1032 (Miss. 2014).

¶12. This Court held in ***Rowland*** "*unequivocally*, that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." ***Rowland***, 42 So. 3d at 506 (emphasis added). ***Rowland II*** then listed three established exceptions to the procedural bars, including the lack of due process in sentencing. ***Rowland v. State***, 98 So. 3d 1032, 1038 (Miss. 2012). The constitutional right to due process in sentencing has long been established as fundamental and is a decided exception to the procedural bars of the UPCCRA. Under this fundamental right, a defendant's guilty plea must be knowing and voluntary.

¶13. In ***Boykin v. Alabama***, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the United States Supreme Court emphasized that a guilty plea is "more than an admission of conduct; it is a conviction." Therefore, the accused should have a full understanding of what the plea connotes and of its consequences. ***Id.*** at 244, 89 S. Ct. 1709. Constitutional considerations of due process require that all guilty pleas must be knowing, intelligent, and voluntary. ***Id.*** at 238, 89 S. Ct. 1709; *see also* ***Alexander v. State***, 226 So. 2d 905 (Miss. 1969).

¶14. The Fifth Circuit also has held that "Defendants . . . give up constitutional rights in reliance on promises made by prosecutors, implicating the Due Process Clause once the court accepts their pleas. The failure of the Government to fulfill its promise, therefore, affects the fairness, integrity, and public reputation of judicial proceedings." ***U.S. v. Goldfaden***, 959 F.2d 1324, 1328 (5th Cir. 1992).

¶15. Before Madden pleaded guilty, the circuit court entered an order in which the State announced it was waiving "the enhanced portion of the Indictment." The indictment charged Madden with two enhancements: as a repeat offender under Mississippi Code Section 41-29-147 and as a habitual offender under Section 99-19-81.

¶16. On Madden's Petition to Enter a Plea of Guilty, in the blank space following the statement listing Madden's possible sentence, is handwritten, "open plea; state to drop enhancement portion of indictment." Another handwritten note to the left margin of this statement reads, "[d]efendant indicted as habitual offender, sentence to be day for day."

¶17. Madden contends that the handwritten note on the petition referring to his status as a habitual offender was absent when he agreed to and signed the petition. The handwritten portion of the petition stating that Madden's sentence was to be day-for-day is written in the left margin of the petition, instead of in the ample amount of blank space left underneath the statement regarding sentencing. If Madden's assertions are true, it is far within the realm of reasonableness to believe that Madden was under the assumption that the State was waiving both the habitual-offender charge and the repeat-offender charge under the indictment when Madden pleaded guilty.

¶18. It is undisputed that Section 99-19-81 provides for an enhanced penalty, and is commonly referred to as an enhanced punishment in an indictment. *See* ***Wells v. State***, 2015 WL 574761, No. 2012-KA-01781-SCT (Miss. 2015); ***Hampton v. State***, 148 So. 3d 992 (Miss. 2014); and ***Williams v. State***, 131 So. 3d 1174 (Miss. 2014). In the order, the State agreed to drop the "enhanced portion of the indictment," but the order did not refer to a

statute number or differentiate between the two sentence enhancements in the indictment. The phrase "enhanced penalty" also does not appear in the body of the indictment or in any other place. The State's order agreeing to drop the "enhanced portion of the indictment" is vague, and an evidentiary hearing is required to determine whether Madden knowingly pleaded guilty to a day-for-day sentence as a habitual offender.

¶19. It is a fundamental right that no person is to be deprived of liberty without due process of law. U.S. Const. amends. V, XIV; Miss. Const. art. 3, § 14. Madden claims that, if he had realized the State was not dropping both enhancement charges, Madden would not have pleaded guilty. Only a voluntary guilty plea functions as a waiver. ***Brooks v. State***, 573 So. 2d 1350, 1352-53 (Miss. 1990). If the handwritten note in the margin of the petition to plead guilty was added subsequently, and Madden was sentenced as a habitual offender under the reasonable belief that the State had agreed to waive both enhanced charges in the indictment, then Madden's guilty plea was not knowing and voluntary. Thus, Madden was deprived of liberty without due process of law.

¶20. Due process and ensuring the fundamental fairness of judicial proceedings mandate that Madden receive an evidentiary hearing to determine whether the handwritten portion of the petition referring to Madden's habitual-offender status existed at the time Madden signed the petition, and whether Madden knowingly and voluntarily pleaded guilty to transfer of a controlled substance as a habitual offender. Madden's first PCR motion was summarily dismissed without an evidentiary hearing, and Madden was denied a copy of the transcript of his guilty plea. A prisoner is entitled to a transcript once the prisoner's PCR motion has

withstood summary dismissal. ***Ward v. State***, 879 So. 2d 452 (Miss. Ct. App. 2013). Madden should now receive a copy of the transcript of his plea hearing to assist in presenting his claims.

¶21. I believe that there is a definite concern that Madden reasonably believed the State waived as enhancements both the habitual-offender charge of the indictment as well as the repeat-offender charge at the time he signed the petition to plead guilty. Thus, Madden should be given an opportunity to present his claims. Accordingly, this Court should reverse the judgments of both the Court of Appeals and the Harrison County Circuit Court and remand the case to the trial court for an evidentiary hearing.